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No. 87-1305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

KOONS FORD OF ANNAPOLIS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

DISTRICT 65, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR MARYLAND NEW CAR AND TRUCK DEALERS ASSOCIATION AND THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION AS AMICI CURIAE SUPPORTING THE PETITIONER

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QUESTION PRESENTED

Whether the Court of Appeals denied the Employer a fair hearing and undermined the sound public policy favoring settlements by *sua sponte* using a settlement agreement which contained a "non-admissions" clause to find that the Employer had engaged in the misconduct resolved by the settlement.

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INTEREST OF NATIONAL AUTOMOBILE DEALERS ASSOCIATION AND MARYLAND NEW CAR AND TRUCK DEALERS ASSOCIATION

The National Automobile Dealers Association is a trade association with offices in Washington, D.C., representing over 20,000 franchised automobile and truck dealers located throughout the United States. The Maryland New Car and Truck Dealers Association is a trade association with offices in Baltimore, Maryland,

representing over 300 automobile and truck dealers located in Maryland. Both associations have a strong interest in labor relations issues that impact upon their members. In this particular case, both associations apprehend that the decision below poses a threat to their members' ability to voluntarily settle unfair labor practice cases before the National Labor Relations Board without the disquieting risk that such a settlement will subsequently be interposed as proof of wrongdoing in other proceedings. The associations seek to participate as *amici curiae* in support of the Petitioner because they believe the experience of their members in participating in cases before the National Labor Relations Board would be instructive in reaching an appropriate resolution of the issues presented by the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

On January 12, 1983, the National Labor Relations Board ("NLRB") conducted an election among service employees of Koons Ford of Annapolis, Inc. ("Koons" or "the Employer") to determine whether they wished to be represented by District 65, United Automobile, Aerospace and Agricultural Implement Workers of America ("the Union"). Koons' employees rejected the Union by a vote of 39 to 27. (A. 47.) The Union filed objections to the election and unfair labor practice charges, and on May 30, 1984, an NLRB Administrative Law Judge ("ALJ") issued a recommended decision finding that Koons had committed unfair labor practices. The ALJ recommended that the NLRB issue an order directing Koons to recognize and negotiate with the Union, pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). (A. 46-133.)

Koons filed exceptions to the ALJ's recommended decision and order. On three separate occasions while the exceptions were pending before the NLRB, Koons filed motions to reopen the record and to introduce evidence of

changes in ownership, management and employees at the dealership. The motions were intended to show to the NLRB that circumstances had changed sufficiently to permit and require a re-run election, instead of the more drastic remedy of a bargaining order. The NLRB issued its decision on December 24, 1986, affirming the ALJ's finding and issuing a bargaining order. The NLRB summarily denied the three motions to reopen the record on the grounds that "the evidence sought to be adduced would not require a different result." (A. 40 n. 18.) The Employer and the NLRB petitioned the United States Court of Appeals for the Fourth Circuit for review and enforcement, respectively, of the NLRB's order.

While the case was pending before the Court of Appeals, the Employer and the NLRB settled other unfair labor practice charges alleged in a separate proceeding. The duly executed settlement stipulation contained a "non-admissions" clause expressly stating that the Employer did not admit the charges. Pursuant to the Employer's and the NLRB's stipulation, the Settlement Agreement was filed with the United States Court of Appeals for the Fourth Circuit for *pro forma* enforcement of its remedial provisions.

In its opposition to enforcement of the bargaining order, Koons argued to the Court of Appeals that the NLRB had erred in not taking into account changes in circumstances which, according to Koons, made the bargaining order inappropriate. Koons cited *General Steel Products, Inc. v. NLRB*, 445 F.2d 1350 (4th Cir. 1971) and *NLRB v. Apple Tree Chevrolet, Inc.*, 671 F.2d 838 (4th Cir. 1982), as authority for the proposition that the NLRB must consider evidence of changed circumstances in deciding whether to issue a bargaining order.

Without addressing whether the NLRB had adequately considered Koons' proffered evidence of changed circumstances, the Court of Appeals rejected Koons' argument and enforced the bargaining order. The Court of Appeals

stated that a bargaining order is in the nature of an equitable remedy, and that the employer who seeks to reverse such an order must therefore have "clean hands." The Court found that review of the previously enforced settlement agreement revealed that Koons' hands were not "clean." The Court of Appeals stated that while Koons did not admit the violations settled by the stipulation, Koons had "consented to an extensive order requiring compliance with the Act and providing for full and immediate reinstatement" and back pay.[1] (A. 6.) Stating that it had reviewed the record of the settled proceedings, the Court concluded that summary enforcement was appropriate because it would be "a waste of judicial time to remand this cause to the [NLRB] to consider the 'clean hands' issue." (A. 6.) In short, the Court of Appeals clearly relied upon a settlement stipulation containing a non-admissions clause as evidence that the Employer had committed the misconduct covered by the settlement agreement.

REASONS THE WRIT SHOULD BE GRANTED

The Court of Appeals concluded from a settlement agreement that the Employer had engaged in the misconduct alleged in the settled proceedings and thus had "unclean hands." The Court's use of the settlement agreement for this purpose was improper because settlement agreements are not competent evidence from which to conclude that a party engaged in misconduct. The Court of Appeals' error is plain, as is the inescapable conclusion that the Court abused its discretion by disregarding settled rules of law, depriving the Employer of a fair hearing. By "so far depart[ing] from the accepted and

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[1] Rather than requiring the Employer to offer reinstatement, the stipulation and the order simply recognized that the Employer had offered reinstatement, that the employees had declined the offer, and that specified sums would be paid them as "backpay." (A. 11 and 22-23.)

usual course of judicial proceedings . . . ," the Court of Appeals' decision calls for an exercise of this Court's power of supervision. *Sup. Ct. R.* 17.1(a).

The decision below impairs the ability of any respondent in a Board proceeding to enter into a settlement agreement without taking the risk that the agreement will be viewed as an admission. This undermines the strong public policy supporting voluntary settlement of disputes, particularly labor relations disputes. The case, therefore, raises fundamentally important issues that warrant review by this Court.

1. Evidence of Settlement is Not Competent as Evidence That a Party Committed the Wrong Alleged.

The Court's finding of misconduct based on a settlement agreement violated well established rules of law and sound public policy. Assuming *arguendo* that the Court of Appeals could make *de novo* findings of fact,[2] its fact-finding is subject to the Federal Rules of Evidence. *Fed. R. Evid.* 1101(a). See also 29 U.S.C. § 160(b). Rule 408 of the Federal Rules of Evidence directs in unambiguous terms that "[e]vidence of . . . accepting . . . consideration in compromising . . . a claim which was disputed . . . is not admissible to prove liability for . . . the claim . . . ." See also *Breuer Electric Manufacturing Co. v. Toronado Systems of America, Inc.*, 687 F.2d 182, 185 (7th Cir. 1982) ("Rule 408 controls when evidence of settlement attempts is offered 'to prove *lia-*

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[2] The National Labor Relations Act ("the Act") commits the fact-finding function to the NLRB or its agents. 29 U.S.C. § 160 (b) & (c). Where the taking of additional evidence after an appeal is deemed appropriate, the Act instructs a court of appeals to remand the case to the NLRB for the necessary findings. 29 U.S.C. 160(e). There is no support, nor did the Court cite any, for its making *de novo* findings of fact. That error is particularly critical where—as here—newly found facts constitute the *sole* basis for a judicial decision.

bility' . . .") (emphasis in original); *Burns v. City of Des Peres*, 534 F.2d 103, 112 & n.9 (8th Cir.), *cert. denied*, 429 U.S. 861 (1976) (settlements and settlement negotiations are encompassed in *Fed. R. Evid.* 408).

This rule embodies the well established [3] and incontrovertible recognition that the motivation prompting a settlement is ambiguous and an attempt to settle may support multiple and contradictory inferences. Thus, settlement may indicate a party's view either that overcoming an opponent's claim is unlikely or, on the other hand, that peace now is preferable to victory later. *Fed. R. Evid.* 408, Advisory Committee Notes; E. Cleary, *McCormick on Evidence* §§ 74, 274 (2d ed. 1972). In light of this inherent ambiguity, the reliability of such evidence to prove the underlying claim is at best suspect. See J. Maguire, *Evidence—Common Sense and Common Law*, 20, 118, 201-202, 208-209 (1947). For this reason, the use of a settlement to establish the underlying liability defeats the central purpose of the rules of evidence—the ascertainment of truth. *Fed. R. Evid.* 102. See 10 J. Moore, H. Bendix, *Moore's Federal Practice* § 102.02 (1987) (hereafter "*Moore's Federal Practice*").

Rule 408 also serves the strong public policy favoring settlement of disputed claims. *Fed. R. Evid.* 408, Advisory Committee Notes. The rule encourages settlements by protecting settlement agreements, as well as settlement negotiations, from being used to establish the disputed claims. See 10 *Moore's Federal Practice* § 408.02.

Despite this sound and unequivocal bar to inferring liability for a settled claim from the fact of settlement,[4]

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[3] The rule barring the admission of settlements and offers to settle is a longstanding one. See, e.g., *West v. Smith*, 101 U.S. 263, 272-273 (1879); *Home Insurance Co. v. Baltimore Warehouse Co.*, 93 U.S. 527, 548 (1876).

[4] The Court of Appeals' ruling is in direct conflict with rulings in other circuits. See, e.g., *NLRB v. Bangor Plastics, Inc.*, 392 F.2d 772, 775 (6th Cir. 1967) (settlement agreement does not amount to

the Court of Appeals drew just such an inference and relied on it exclusively in finding "unclean hands."[5] This Court has long recognized that such a fundamental departure from established law may give rise to a finding that the right to a fair hearing has been denied. See, e.g., *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957) (petitioner deprived of due process by State's decision based on record which had no evidence that rationally justified its findings); *Ohio Bell Telephone Co. v. Public Utilities Comm. of Ohio*, 301 U.S. 292 (1937) (decision based on evidence petitioner was given no opportunity to challenge denies due process and cannot be cured through use of "judicial notice"). The decision by the Court of Appeals deviates substantially from established rules and concepts of fundamental fairness[6] and warrants this Court's review, as requested by Petitioner.

2. The Court of Appeals' Decision Impairs the Ability of Parties to Settle Without Being Charged With An Admission.

The Court of Appeals' decision poses a palpable threat to the settlement process in NLRB cases. Implicit in any

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a finding or admission that respondent has committed an unfair labor practice); *W.B. Johnston Grain Co. v. NLRB*, 365 F.2d 582, 587 (10th Cir. 1966) (settlement agreement is "not an admission that the Company had been guilty of an unfair labor practice"). See also, *NLRB v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 18 (1943) (an unfair labor practice charge is not proof of the commission of an unfair labor practice).

[5] There is no question that the underlying claims were "disputed" or that they were compromised within the meaning of the rule. (A. 13, 16.) See 10 *Moore's Federal Practice* § 408.02.

[6] The Court simply ignored the parties' contentions with respect to the merits of the case and imposed a bargaining obligation on the Employer. (A. 4-6.) The rationality of the NLRB's decision and the substantiality of its evidentiary support have never been assessed. Instead, the decision has been upheld in reliance on "evidence" never even considered by the NLRB. Cf. *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965); *SEC v. Chenery Corp.*, 317 U.S. 80 (1943).

settlement agreement is the promise that the settlement agreement itself will not be treated as evidence of wrongdoing. Typically, as was the case here, the parties make that promise explicit, by agreeing to a non-admissions clause. The Court of Appeals' decision, if left to stand, undermines that promise and its incentive to settle by putting the party who has settled at a continued risk of being branded a law-breaker. Such an approach also undermines the bargaining process itself by preventing the parties from receiving the benefit of their bargain—that is, the negotiated promise that the settlement will not be treated as an admission.

The undesirability of such a situation cannot be overestimated. Settlements—particularly in the labor relations setting—are critical. As this Court has recognized, "settlements constitute the 'lifeblood' of the administrative process, *especially in labor relations.*" *NLRB v. United Food & Commercial Workers Union*, —— U.S. ——, 108 S. Ct. 413, 423 (1987) (emphasis supplied). That conclusion is compelled not only by the sheer volume of cases which are channeled away from litigation by settlement [7] but also by the unquestioned need for the parties to a labor dispute—employers, employees, and unions —to restore harmony and return to normalcy as quickly as possible. If, as the National Labor Relations Act says, industrial peace is at the very core of the Act,[8] it is hard to imagine how peace can be furthered by converting a "peace treaty" into a weapon that can be used against one of the disputants.

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[7] In 1986, 91.7% of the unfair labor practices charged were settled, while in 1985, the rate was even higher, at 94.4%. *NLRB General Counsel's Report Summarizing Operations in Fiscal Year 1986*, 124 L.R.R. 158, 160 (1987).

[8] 29 U.S.C. § 151(b) (the Act "safeguards commerce . . . by encouraging practices fundamental to friendly adjustment of industrial disputes arising out of differences as to . . . working conditions . . .").

Given the critical role of settlements in the labor relations field, the Court of Appeals' decision undermining the viability of the settlement process is unwise and dangerous.

In sum, the lower court's decision seriously undermines the security of settlement agreements and discourages the parties' resort to settlement as a means of amicably and finally resolving their disputes without the need for litigation. The importance of the settlement practices which are jeopardized by the Court of Appeals compels the review requested by Petitioner.

CONCLUSION

For the reasons stated above, the National Automobile Dealers Association and the Maryland New Car and Truck Dealers Association request that this Court grant the Petitioner's request for a Writ of Certiorari.

Respectfully submitted,

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